JD–190–98
Buffalo, NY

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

CUSTOM TOPSOIL, INC.

and Case 3–CA–21008

INTERNATIONAL UNION OF
OPERATING ENGINEERS,
LOCAL UNION NO. 17

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of Buffalo, New York,
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of Buffalo, New York,
for the Respondent.
Michael E. Reilly, Esq.,
(Morris, Cantor, Barnes,
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of Cheektowaga, New York,
for the Charging Party.

DECISION

Statement of the Case

MARTIN J. LINSKY, Administrative Law Judge. The charge and amended charge in Case 3–CA–21008 were filed by the International Union of Operating Engineers, Local Union No. 17, Union herein, on December 8, 1997 and February 23, 1998, respectively, against Custom Topsoil, Inc., Respondent herein.

On February 26, 1998 the National Labor Relations Board, by the Regional Director for Region 3, issued a Complaint alleging that Respondent violated Sections 8(a)(1) and (3) of the National Labor Relations Act, herein the Act, since June 9, 1997 when it refused to hire 16 union applicants for employment and when on June 16, 1997 and December 11, 1997 it change its hiring practices and policies to restrict the receipt of job applications.

Respondent filed an Answer in which it denied that it violated the Act in any way.

A hearing was held before me in Buffalo, New York, on August 10 and August 11, 1998.[1]

Upon the entire record in this case to include post hearing briefs submitted by the General Counsel, Respondent, and the Charging Party and upon my observation of the demeanor of the witnesses I make the following

Findings of Fact

I. Jurisdiction

At all material times, Respondent, a corporation, with an office and place of business in Buffalo, New York, has been engaged in the construction industry as a site contractor.

Respondent admits, and I find, that at all material times Respondent has been engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. The Labor Organization Involved

Respondent admits, and I find, that the Union has been a labor organization within the meaning of Section 2(5) of the Act.

III. The Alleged Unfair Labor Practices

A. *Background & Overview*

This is a so-called "salting" case. "Salting" is a practice where union members, under the direction or at the suggestion of a union organizer, seek employment with non-union employers in order to get hired and to organize the non-union employer's employees.

The Respondent in this case was targeted to be salted. This was not the first time. In June 1996, Respondent was the target of a "salting" campaign that led to unfair labor practice charges being filed and the issuance of a Complaint. That Complaint was tired before Judge Eleanor MacDonald on December 8 and 9, 1997. Judge MacDonald issued a decision on June 22, 1998 finding, *inter alia,* that Respondent violated Section 8(a)(1) and (3) of the Act when it refused to hire 7 job applicants because they were members of the Union. Exceptions were filed and her decision (JD(NY)-14-98) is pending before the Board.

The case before me involves a "salting" effort in June 1997.

B. *Facts and Analysis of "Salting" Case*

Chris Hollfelder is a union organizer for Operating Engineers Local No. 17, the charging party in this case. His objective with respect to Respondent was to help get union members hired by Respondent and then to organize Respondent's employees.

[1] Respondent's Motion to Correct Transcript, as modified by the Charging Party's Motion to Correct Transcript, is granted.

On June 9, 1997 Hollfelder gathered at the union hall with 16 union members. The 16 union members filled out applications for employment on forms provided by the union.

At approximately 2 p.m. on the afternoon of June 9, 1997 Hollfelder and the 16 union applicants went to Respondent's office in Cheektowaga, New York, a community right next to Buffalo, New York. They did not have an appointment and Respondent did not require appointments.

As the 16 union applicants for employment, a number of whom were wearing union hats and jackets, approached Respondent's office, the person in charge at Respondent's office Diane Burger, the daughter of Respondent's President Henry Fronckowiak and the sister of Michael Fronchowiak who ran Respondent's day to day operations, called out to her subordinates to close and lock all the windows and doors.

The applicants for employment were refused entry to Respondent's offices.

Hollfelder knocked on the door eventually getting Diane Burger's attention and told her they were there to apply for jobs. Burger spoke on the phone with someone and told Hollfelder that the job applications they wanted to submit could be slipped through the mail slot. Hollfelder slipped the 16 applications for employment through the mail slot and he and the job applicants left the area. Not only were the applicants for employment denied entry into the office but Burger did not even open the door. Hollfelder was not himself an applicant for employment. It is under these highly unusual circumstances that Respondent received the 16 job applications on June 9, 1997. It was stipulated before me that the union applicants were not unruly on June 9, 1997. The police were not called. While Diane Burger conceded at trial before me that she had overreacted when she saw the job applicants approach the offices of Respondent, I do not credit her testimony that she did not know they were union affiliated applicants. She knew they were because some wore union hats and jackets and her reaction manifests extraordinary union animus.

The applications of the 16 union members, three of whom, Lisa Smoczynski, James Smolinski, and William Frye, testified before me reflect that the were highly qualified in the skills needed by Respondent to conduct its business which is the operation of two concrete crushing plants as well as demolition and site development work.

The 16 applicants and their years of experience as reflected in their job applications are as follows:

1. Richard Benz (3 years experience)
2. Steve Curtin (7 1/2 years experience)
3. John J. Danahy (years of experience not listed on application)
4. James Erhardt (6 years experience)
5. Steven A. Everett (14 years experience)
6. William R. Frye (16 years experience)
7. Mah Hogey (10 years experience)
8. Paul Hopkins (8 years experience)]
9. Eric Maybee (7 years experience)
10. James McGann (31 years experience)
11. Ellen Preischel (years of experience not listed on application)
12. Michael Radetich (27 years experience)
13. Nathaniel A. Raffner (4 years experience)
14. Lisa Smoczynski (4 years experience)

15. James A. Smolinski (35 years experience)
16. Anthonio Ventresca (years of experience not listed on application)

All 16 applicants, to include the three who did not list on their applications the number of years of experience they had, listed the skills they possessed.

All 16 applications reflected that the applicant was a voluntary union organizer and would work for the wages that would customarily be paid a worker of their experience.

All 16 applicants noted on their applications that they would take any job offered.

It is clear that Respondent when it received the applications of the 16 applicants on June 9, 1997 knew from the applications that the applicants appeared imminently well qualified for employment by Respondent and that they were union affiliated and, if hired, would attempt to organize Respondent's employees because each of the 16 applications contained the following language:

> "I am a voluntary union organizer. If hired, I will perform all duties to the best of my ability. I will also attempt, during nonwork time and in nonwork areas, to organize Operating Engineers into Local Union #17."

None of the 16 union applicants for employment were even called by Respondent for an interview or offered a job by Respondent. None, obviously, went to work for Respondent.

On June 16, 1997 Respondent sent to the union a letter which provided as follows:

"June 16, 1997

International Union of Operating Engineers
Local 17
150 North America Dr
West Seneca, NY 14224

To Whom it may concern:

We are in receipt of the 'applications' that were dropped off at our office last week.

Please be advised that they will be reviewed and considered.

Should you wish to send people in the future, we ask that you limit the number of people to a maximum of two (2) at a time. We are unable to accommodate any more than that, and the large crowd that showed up last week created a perceived safety issue. We hope you will understand we must protect our office staff's safety.

Thank you."

The evidence at trial reflects that since June 9, 1997 Respondent has hired 17 persons to do work which the 16 union applicants appear qualified to do based on their applications. The 17 people hired by Respondent began work over a 13 month period between June 23, 1997 and July 13, 1998 in the following order:

1. John Cuttitta June 23, 1997

2. John Nelson	August 5, 1997
3. Steve Swinarski	August 18, 1997
4. Kevin Haag	August 25, 1997
5. Glenn Ranno	August 26, 1997
6. Michael Webster	September 29, 1997
7. Norman Faulkner III	October 13, 1997
8. Doris Patterson	March 3, 1998
9. Walter Swinarski	April 28, 1998
10. David Zielinsky	April 28, 1998
11. Caroline Basker	May 5, 1998
12. Robert Crawford	May 13, 1998
13. Ray Schafer, Sr.	May 19, 1998
14. Douglas Hyman	May 26, 1998
15. Richard Fronckowiak	May 26, 1998
16. Jay Pauley	July 6, 1998
17. Lyle Emerson	July 13, 1998

For some time Respondent had a sign posted in its office which said that applications were not being accepted. The sign was inside Respondent's office but could not be seen by the union applicants who applied for jobs on June 9, 1997. However, Respondent's own witness Diane Burger testified that one week after the 16 union applicants applied for work on June 9, 1997 the sign was taken down. In other words the sign was removed on the same day that Respondent started accepting applications and on the same day it wrote to the union that the applications of the 16 union applicants would be "reviewed and considered."

Respondent claims that prior to being salted in June 1996 its policy was to discard and throw away job applications if Respondent had no openings. Since being salted in June 1996 Respondent's policy is to send applications it doesn't need to its lawyer, Jeremy Cohen, Esq. Respondent keeps no file on hand of applications it receives and would then consider if it had a job opening.

However, I find credible the testimony of James A. Smolinski. Smolinski was one of the 16 union applicants for employment on June 9, 1997. After not hearing from Respondent for one month Smolinski called Respondent's office. Smolinski did not identify himself as a union member but simply "called, identified myself; who I was and the person asked me my reason for calling and I said that I think I have an application there on file and the person said 'we're not hiring, we will call you back' and I never heard from — again from Custom Topsoil and I have an answering machine." (Tr. 50)

Respondent is a family business and day to day operations and hiring are done by Michael Fronchowiak, the son of Respondent's President and owner Henry Fronchowiak.

Michael Fronchowiak testified that when he needs to hire someone he will ask his other employees to recommend people to him and that he also consults business associates and job superintendents for recommendations.

If an application is received at the office it is put in his in-box and he reviews it when he gets a chance. He spends most of his time in the field and not in the office. With particular reference to the 16 union applicants of June 9, 1997 he testified as follows:

> "Q. Were you aware that union applicants had applied for work on or around June 9, 1997?

A. Yes, I was.

Q. And, had you seen the applications which they gave to Diane Burger on that date?

A. Yes.

Q. And, were those applications that you — did you read those applications?

A. No.

Q. Did you read any of the applications?

A. I said I might have thumbed through the names or something, that's about all.

Q. How long of a period did you spend reviewing applications submitted by the 16 applicants?

A. I don't recall.

Q. Was a it something like you spent 30 minutes or you spent five minutes?

A. No more than five minutes.

Q. And, that's for all 16 applications?

A. Yes." (Tr. 242).

Fronchowiak then sent the applications to his attorney. When asked later in his testimony if anyone's application in the pile of union applications looked like they might be useful during the 1997 construction season he replied "I didn't really look at them." (Tr. 243)

However, the June 16, 1997 letter to the Union advised that the applications "will be reviewed and considered." It is obvious by Burger's actions on June 9, 1997 and Fronchowiak simply going through the motions that because of union animus Respondent had no intention of considering for hire or hiring any the union applicants. I should also note that the claimed safety threat of June 9, 1997 is utter and complete nonsense.

Respondent seems to think that if it sends applications to its attorney it is forbidden by law to consider those applications in filling openings. As Judge MacDonald noted in her decision "[Michael] Fronchowiak would have me accept the statement that because his lawyer had the original applications he himself had no applications pending for the Union members when he was hiring new employees after June 13, 1996. This position is pure sophistry. Of course, Respondent is deemed to have applications in its possession when it has turned them over to its attorney. Had Fronchowiak been in good faith, he could have obtained the originals or copies of the applications by making one telephone call." JD(NY)-41-98 at page 8.

It would seem appropriate at this juncture to discuss the 17 people who were hired by Respondent after June 9, 1997.

Ray Schaffer, Sr., worked only one day. He is an elderly gentleman (late 70's at the

time) and was an old friend of Henry Fronchowiak, Respondent's president, and was hired for old times sake.

Lyle Emerson was a former employee of Respondent and was hired as a foreman.

Doris Patterson was known to Respondent because she worked for one of Respondent's subcontractors and Respondent was familiar with her skills and this was true for Kevin Haag as well.

John Cuttitta was hired on the recommendation of his father Anthony Cuttitta who worked for Respondent.

Robert Crawford was also a former employee of Respondent and Respondent was familiar with his skills.

Lastly, Richard Fronckowiak was a brother to Henry Fronckowiak and an uncle to Michael Fronckowiak and uncle to Diane Burger.

I find that the hiring of Ray Schaffer, Sr., Lyle Emerson, Doris Patterson, Kevin Haag, John Cuttitta, Robert Crawford, and Richard Fronckowiak is not evidence of unlawful discriminatory hiring by Respondent because these hiring selections were made on a basis other than union or no union affiliation.

However that leaves 10 jobs that were filled by new hires where the union applicants were refused hire, in my opinion, because of their union affiliation.

The 16 union applicants were well qualified and experienced as reflected in their applications which are in evidence whereas many of those actually hired by Respondent are decidedly less qualified, e.g., Steve Swinarski had what Michael Fronchowiak himself referred to as "minimal" experience (Tr. 258) and I believe Fronckowiak is correct because Swinarski listed his work experience as one of detailing cars. Norman Faulkner III had no experience in construction, and David Zielinski's experience was in cleaning floors.

Respondent, in its defense claims that it did offer employment to Joel Nuwer in March 1998 and that Nuwer was a union member but Nuwer turned down the job. There is no evidence to support Michael Fronchowiak's statement that he offered Nuwer a job, e.g., no application for Nuwer and Nuwer did not testify. But even if Nuwer was offered a job it does not necessarily follow that Respondent did not discriminate against the 16 union applicants who filed applications on June 9, 1997 because Nuwer, unlike the 16 union applicants, never identified himself as a voluntary union organizer.

The Board has held the elements of a discriminatory refusal-to-hire case include the employment application by each alleged discriminatee, the refusal to hire each, or showing that each was or might be expected to be a union supporter or sympathizer, and further showings that the employer knew or suspected such sympathy or support, maintained an animus against it, and refused to hire the applicant because of such animus.

Considering all the evidence above recited and taking into consideration the Board's landmark decision in *Wright Line,* 251 NLRB 1083 (1980), enforced, 662 F.2d 899 (1st Cir. 1981), cert. denied, 455 US 989 (1982) and Board decisions in other so called "salting" cases, e.g., *M.J. Mechanical Services, Inc.,* 324 NLRB No. 130 (1998), *Walz Masonry Inc.,* 323 NLRB No. 216 (1997), and *Fluor Daniel, Inc.,* 304 NLRB 970 (1991), I find that Respondent violated

Section 8(a)(1) and (3) of the Act when it failed and refused to hire the union applicants who filed applications with Respondent on June 9, 1997.

Needless to say if Judge MacDonalds' decision is affirmed by the Board and her findings of union animus left undisturbed this is further evidence to support my finding of a Section 8(a)(1) and (3) violation. In particular Judge MacDonald found that Respondent's agent, bookkeeper Michelle Podpora, on June 13, 1996 told union applicants that Respondent was "non-union" and that applicants' union membership would affect their chances of being hired. Podpora's statements were captured on tape and Judge MacDonald discredited Podpora's denial that she said union membership would affect the chance of being hired. Podpora testified before Judge MacDonald in December 1997 some six months after the June 1997 salting effort which is the subject matter of this case.

C. Change in Hiring Practices in June and December 1997

In its June 16, 1997 letter to the union Respondent wrote "should you wish to send people in the future, we ask that you limit the number of people to a maximum of two (2) at a time." Judge MacDonald found in her case that the reception area at Respondent's office had a table that could accommodate three (3) people. Even one of the General Counsel witnesses in the case before me, Lisa Smoczynski, testified that the office was small.

I do not find that the imposition of this rule of "two applicants at a time" was unlawful even if promulgated with antiunion motivation because it is a reasonable rule considering how small the reception area is and the rule does not limit the number of applicants who can apply at one time but only that no more than two at a time can be in the office. This is how the rule was understood by the Union and understood and enforced by Respondent. In December 1997 union applicants for employment entered Respondent's office two at a time to apply and more than two a day could and did apply.

In December 1997 on one of the days that Judge MacDonald was hearing her case involving Respondent union affiliated applicants for employment went to Respondent's office to apply for a job. Thereafter, Respondent in a letter dated December 15, 1997, to the union applicants advised that applicants for employment must "personally complete a Custom Topsoil, Inc. application at our office" and that Respondent's "office is available for that purpose from 9:00 am to 12:00 noon and from 1:00 p.m. to 3:30 p.m., Monday through Friday."

It is alleged that requiring applicants to complete one of Respondent's application at Respondent's office was a new rule unlawfully designed to make it more difficult for union affiliated applicants for employment to apply for work with Respondent.

Respondent claims that this was not a new rule but was always their rule which may or may not have always been enforced. Further, Respondent has the rule so that it will know if the applicant can read and write and that the signature on the application form is actually that of the applicant. In addition, Respondent claims its application form asks for pertinent information that may not be on a resume or generic application, e.g., that the applicant is 18 years of age or older, the applicant's social security number, educational background, and references.

Even if the enforcement of this old rule or implementation of a new rule was motivated by union animus I do not find it unlawful because Respondent's office is conveniently located near Buffalo and not in a remote area and my own experience with Board cases discloses that many employers have requirements that applications be filled out in person on the employer's application form. These rules make sense and in the context of this case are not unreasonable

and, therefore, not unlawful.

Remedy

Between June 9, 1997 and the hearing before me in August 1998 Respondent hired 17 people into positions for which the 16 union applicants appear imminently well qualified. Seven of the 17 people hired were hired for reasons that had nothing to do with the union pro or con. Ten positions, therefore, were available to be filled by the 16 union applicants. I will leave to the compliance stage of this proceeding the determination as to which of the 16 union applicants is offered one of the 10 jobs.

Backpay, of course, should be paid and Respondent ordered to post a notice and cease and desist from its unlawful behavior.

Conclusions of Law

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent violated Section 8(a)(1) and (3) of the Act when it failed to hire 10 of 16 union applicants for employment.

4. This unfair labor practice is an unfair labor practice having an effect on commerce within the meaning of Section 2(6) and (7) of the Act.

On these findings of fact and conclusions of law and on the entire record I issue the following recommended[2]

ORDER

The Respondent, Custom Topsoil, Inc. Its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to hire applicants for employment because they are members of a Union.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order offer 10 of the 16 discriminatees the jobs

[2] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

which they were denied or, if those jobs no longer exist, to substantially equivalent positions at new job sites, if necessary, and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them. Backpay to be computed on a quarterly basis as prescribed in *F.W. Woolworth Co.,* 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

(b) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Within 14 days after service by the Region, post at its facilities in Buffalo and Cheektowaga, New York and all other places where notices customarily are posted, copies of the attached notice marked "Appendix."[3] Copies of the notice, on forms provided by the Regional Director for Region 3, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced or covered by any other material. In the event that the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 9, 1997.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. November 17, 1998.

Martin L. Linsky
Administrative Law Judge

[3] If this Order is enforced by a judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

JD–190–98
Buffalo, NY

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT fail and refuse to hire applicants for employment because they are members of a union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL within 14 days from the date of this Order, offer immediate employment to 10 of the 16 following applicants for employment, i.e., Richard Benz, Steve Curtin, John T. Danahy, James Erhardt, Steven A. Everett, William R. Frye, Mah Hogey, Paul Hopkins, Eric Maybee, James McGann, Elle Preischel, Michael Radetich, Nathaniel Raffner, Lisa Smoczynski, James A. Smolinski, Antonio Ventresca and WE WILL make them whole for any loss of earnings and other benefits resulting from our discrimination, less any net interim earnings, plus interest.

CUSTOM TOPSOIL, INC.
(Employer)

Dated _____ By _____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered with any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 111 West Huron Street, Room 901, Buffalo, New York 14202–2387, Telephone 716–846–4951.